



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 2, 1998

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
Office of the City Attorney
P.O. Box 152288
Irving, Texas 75015-2288

OR98-0882

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113761.

The City of Irving (the "city"), received a request for

[t]he title, salary, term of employment (hiring and firing dates), number of sexual harassment complaints made verbally or in writing against Jim Bridgman. And copies of any written reports regarding this issue.

You state that the title, salary, and term of employment have been disclosed to the requestor over the telephone. You claim that the remaining requested information is excepted from disclosure under sections 552.024, 552.102, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. You inform us that there is a pending criminal investigation and prosecution by the city against the subject of the request for information. In this instance, you have made the requisite showing that the offense report relates to pending criminal litigation for purposes of section 552.103(a).

We assume, however, that none of the information in the offense report has previously been made available to the criminal defendant in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the accused has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). In addition, we note that front page incident report information may not be withheld from disclosure under section 552.103. See Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information incident report); see also *Houston Chronicle Publ'g. Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. -- Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (information normally found on front page of offense report is generally considered public). Moreover, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now address your other claimed exceptions to the remaining information. Section 552.102(a) of the Government Code is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be

withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Although information relating to an internal investigation of sexual harassment claims involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. *See* Open Records Decision No. 444 (1986). The court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen* and prior decisions of this office, *see, e.g.*, Open Records Decision Nos. 393 (1983), 339 (1982), the city must withhold the identities of the witnesses to the alleged harassment and the identity of the alleged victim, and any information which would tend to identify the witnesses or victim.¹ We have marked the type of information which you must withhold under common-law privacy.

We next address your assertion that some of the information you submitted for our review is protected from disclosure by section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or

¹We note that the common-law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance, *see* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978), and therefore, the identity of the alleged offender may not be withheld from the requestor.

between attorneys representing the client, are not protected. *Id.* Moreover, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records No. 630 (1994) at 4. We find that one of the documents, which we have marked, reveals the attorney's opinions or legal advice, and may therefore be withheld from disclosure.

You also raise section 552.024. Sections 552.024 and 552.117 work in conjunction to provide that a current or former public employee or official can opt to keep private his or her home address, home telephone number, social security number, and information that reveals that the individual has family members. You must withhold this information wherever it appears in the submitted documents if, as of the time of the request for the information, the employee or former employee had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 113761

Enclosures: Marked documents

cc: Ms. Diane Smith
Star Telegram/Northeast
3201 Airport Freeway, Suite 108
Bedford, Texas 76021
(w/o enclosures)